Federally Speaking

Number 10

by Barry J. Lipson

***The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column* Federally Speaking**

FEDERAL LAWYER OF YEAR AWARD. This year the nominees are Richard DiSalle, Esq., Thomas M. Kerr, Esq., William F Manifesto, Esq., and Shelley Stark, Esq. The envelope, please! The winner is….. Be there at the Engineers Society at Noon on December 12, 2001, to learn whom the distinguished Federal Bar Association Advisory Council chose, and enjoy lunch with the Federal Judiciary (a different Judge usually presides over each table). Call Sue Santiago at 412 281-4900 immediately to reserve your space. At $19.95 you can eat your "beef" or we will "spot" you a fish with your judicial discourse (or tables of 8/10 can be reserved for 159.60/199.50), followed by intellectual and caloric dessert.

Fed-pourri™

WAR DECLARED THRU 2005? The major provisions of the **"USA Patriot Act,"** a/k/a the **Anti-Terrorism Legislation,** curtailing civil liberties "sunset" or "shall cease to have effect on December 31, 2005." This legislation, enacted as a direct response to the events of September 11, 2001, which has been referred to by some as "draconian," certainly places our **Federal Justice System** on a war footing. It eases the detention of some suspects without charges, and allows police to secretly search the homes of suspects, tap their home and cell telephones and track their use of the Internet. But some thought has been given to Ben Franklin's caution that those who "can give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." In addition to the most "draconian" provisions "sunsetting" in four years, the Attorney General's power to detain/incarcerate non-citizens based on mere suspicion is limited to seven days (if deportation proceedings have NOT been commenced); the use of "Carnivore" devices, which scan "through tens of millions of emails and other communications from innocent Internet users as well as the targeted suspect," as reported on in the October 5, 2001 **Federally Speaking** column, is regulated by excluding general access to the "content" of the messages and by requiring Carnivore Reports to **Congress**; and the **Inspector General** of the **U.S. Department of Justice (DOJ)** is required to designate an official who shall review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the **DOJ**, publicize the responsibilities and functions of and how to contact this official, and semi-annually submit Reports to **Congress** on the implementation of this requirement and the details of the abuse complaints received. Hopefully, we will not re-visit the subsequently **Constitutionally** condemned internment of "ethnically objectionable groups," as was the fate of ethnic Japanese during the Second World War.

"COMMERCIAL TERRORISTS" – UTAH-STYLE. During the 2001 legislative session, Utah created a new crime called "Commercial Terrorism," applicable to all persons or business (**Utah House Bill 322, Domestic Terrorism of Commercial Enterprises**). A "Commercial Terrorist" (C.T.) is any individual who "enters … a building of any business with the intent to interfere with the employees, customers, personnel, or operation of a business." And get this; you are a C.T. who unlawfully "enters" a place of business, if you cause "the intrusion of any physical object, sound wave, light ray, electronic signal or other means of intrusion" under your control, into such building. Well, **U.S. District Court** Judge Bruce Jenkins, in a post-World Trade Center ruling, declared Utah's "Commercial Terrorism" statute facially unconstitutional and permanently enjoined the law from taking effect. This ruling resulted from a lawsuit brought on behalf of the Utah Animal Rights Coalition, whose members feared that under the statute, the lawful demonstrations they regularly conduct on sidewalks in front of Utah businesses would be classified as criminal activity. While the World Trade Center "Political Terrorists" would certainly have violated this statute if the Twin Towers had been in Utah, hopefully there are more traditional criminal sanctions to deal with their ilk without criminalizing a whole spectrum of basically benign and even **Constitutionally** protected human conduct. Potential C.T.'s of the World beware! None know what future "intrusions" the legislature may want to ban.

MICROSOFT REMEDIES: "THE HARSHEST AND BROADEST POSSIBLE?" Paul Harvey, Jr., here's "the rest of the story:" The pressure was building. Not only had the **U.S. Supreme Court** refused to hear Microsoft's appeal plea to throw out Judge Thomas Penfield Jackson's original guilty verdict as the **U.S. Court of Appeals for the District of Columbia** had thrown out Judge Jackson's "breakup" remedy, but the new Judge, Hon. Colleen Kollar-Kotelly, had informed Microsoft that if a settlement was not reached any remedies against that company would be **"the harshest and broadest possible."** It is also reported that the new Microsoft Judge intimated that these "harshest" remedies could include the opening of the Windows source code to competitors and serious curbs on Microsoft's anti-competitive behavioral conduct. Remedial Hearings were already set for March 2002, and the Judge was ready to require mediation. Well, Ripley, "believe it or not," the resolve of even "Micro" softened, and Bill Gates and crew now appear to be in a settling frame of mind.

BETTY CROCKER TO WED DOUGHBOY – PART 2. The **FTC Commissioners**, with **FTC Chairman** Timothy J. Muris again not voting, by "default" declined to challenge another major food industry merger, this time the proposed acquisition by Betty Crocker's General Mills, Inc. of the Doughboy's Pillsbury Company, from Diageo plc (Part 2). The line-up in Part 2 was the same, with Commissioners Sheila F. Anthony and Mozelle W. Thompson voting for legal action to block the merger, and Commissioners Orson Swindle and Thomas B. Leary this time wanting to accept a consent settlement. Part 1, the prior acquisition also "approved by default," was PepsiCo, Inc.'s acquisition of The Quaker Oats Company. According to Commissioners Anthony and Thompson, "all of the Commissioners believe that General Mills' proposed acquisition of Pillsbury violates the **antitrust laws**" (Thompson), and "when the competitive overlaps are this great, the underlying antitrust violation is this clear-cut, efficiencies are scant or non-existent, and the risk of consumer injury is this high, the standards for an acceptable settlement should be quite stringent" and were not met here (Anthony). "Moreover, accepting the proposed settlement would shift the risk inherent in this approach to the consumer, and would send a signal to the market that such shifting is appropriate. It is not" (Thompson). "Order or no Order," however, Commissioners Swindle and Leary are "convinced" that the parties

participating in these nuptials "will honor the letter and the spirit of their promises" to the **FTC** staff that would have appeared in a Consent Order if one had been approved (FTC **File Number 001-0213).**

BUT AT THE U.S. JUSTICE DEPARTMENT…… On the same day the **FTC** declined to challenge the merger of General Mills, Inc. and The Pillsbury Company, t**he U.S. Department of Justice** filed an antitrust lawsuit to block the proposed acquisition of Newport News Shipbuilding Inc. by General Dynamics Corporation, on the grounds that if the merger were allowed to proceed, it would eliminate competition for nuclear submarines, harm competition for other military ships, and substantially lessen competition in surface combatants. Newport News is the sole supplier of nuclear aircraft carriers to the **U.S. Navy**, as well as one of two suppliers of nuclear submarines. General Dynamics, the other supplier of nuclear submarines, is one of the nation's largest military suppliers, developing and producing numerous military platforms and systems, surface combatants, the M-1 Abrams tank, armored troop carriers, and various surveillance, communications, and intelligence systems. These two companies are also leaders on the only two teams working to develop electric drive technology for nuclear submarines and surface combatants. "Our armed forces need the most innovative and highest quality products to protect our county. This merger-to-monopoly would reduce innovation and, ultimately, the quality of the products supplied to the military, while raising prices to the U.S. military and to U.S. taxpayers," advised Charles A. James, Assistant Attorney General in charge of the Department's Antitrust Division.

The Commonwealth of Westsylvania. Did you know that we here in the "Big H" could have all been "**Westsylvanians**"? Or, as "**Transylvanians**," might have had that illustrious Vamp-slayer Buffy stationed here"? Well, we have all mused at one time or another over the apparent lack of geographic and economic rationale for Pittsburgh and Philadelphia being in the same eco-political sub-unit. It turns out that Western Pennsylvania has a history of wanting to be a separate State. As early as 1775 the **Continental Congress** was petitioned by our forbearers to recognize "**Transylvania**" as the **Fourteenth Colony**. Then, the next year, in 1776, Western Pennsylvanians, apparently together with their kindred spirits, those mountain folk who would later be known as West Virginians (both Pennsylvania and Virginia were laying claim to this region), announced that they were the new "**State of Westsylvania**." Their rationale: "no country or people can be either rich, flourishing, happy or free . . . whilst annexed to or dependent on any province, whose seat of government is . . . four or five hundred miles distant, and separated by a vast, extensive and almost impassible tract of mountains . . ." With traffic snarls, computer viruses, myopic vision and increased security has much changed?

THE WHISKEY REBELLION REVISITED. Two hundred and ten years after the new **United States Government** adopted the **Excise Tax of 1791** to tax whiskey, the Whiskey Rebellion, as recreated by the Federal Bar Association, West Penn Chapter, was a resounding success. Not only were their mirth, whiskey and song at this well attended annual event, but also at the very popular preceding CLE, it was finally disclosed that the Honest Western Pennsylvanian Rebel Farmers actually triumphed over the Unabashed Revenuers. First, the 25% excessive **U.S. Excise Tax** disappeared after the rebellion ceased in 1794 without the expected bloody confrontation. Then, with the ratification on December 5, 1933 by Pennsylvania, Ohio and Utah, of the **Twenty-first Amendment to the U.S. Constitution**, repealing prohibition, the Rebellion was ***won***! This **Amendment**

finally and **Constitutionally** recognized the supremacy of **State Whiskey Laws** by declaring that the "transportation or importation into any State, Territory, or possession of the **United States** for delivery or use therein of intoxicating liquors, ***in violation of the laws thereof,*** is hereby prohibited." Of course, ***the Feds can still tax***, and Pittsburgh is considering adding a 10 % "pouring tax" on whiskey and it's kindred spirits!

OUR FTC CHALLENGE -- CURRENT STATUS. In our last Federally Speaking column we "exposed" the prevalent problem of sellers adding disguised or hidden charges to consumer products and services so that consumers are misled when trying to compare prices between competing suppliers or otherwise; or worse yet when a combination of competitors in effect secretly agrees to and does raise prices by each adding this surreptitious new charge. Examples cited included Firestone's "Shop Charge," National Car Rental's "Concession Recoup Fee," Marriott's "Energy Fee," and other hotels' "Telecommunication Fees." We then challenged the **FTC** to protect consumers from these clearly deceptive and "unfair trade practices," and provided **Federal Trade Commission** Chairman Timothy J. Muris with an advance copy of this last column, particularly calling his attention to "the story under the headline, ***But That's The Only One; The FTC Protects Us Otherwise, Right?,*** where we issue a challenge to the Commission in the area of disguised and hidden consumer charges. We would be interested in being kept apprised of any action the Commission takes in this latter regard." As of the date this column went to the printers, we have received no response from him to "Our Challenge."

SEE YOU NEXT YEAR IN THE COURTROOM OF THE FUTURE! The Federal Bar Association, West Penn Chapter, on behalf of **the U.S. District Court for the Western District of Pennsylvania**, again provided instruction to the local **Federal Bar** on the awe and wonder of the new **Electronic Courtroom,** through its well-received and fully subscribed CLE program "The Ons and Offs of The Electronic Courtroom." This year the off-site witness, who was the subject of direct and cross-examination, testified from Chicago. In the absence of Judge Cindrich, yours truly presided, adding "redaction" to the bag of electronic tricks. The next session will be held in a year. Check this column for date and time. The place, as always, will be the **Federal Courthouse**, in the **Electronic Courtroom** presided over by **U.S. District Judge Robert J. Cindrich**

THE FEDERAL CLE CORKBOARD™

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Wed, December 12, 2001–Federal Lawyer of the Year Award and Federal Judges Luncheon. Details above (call Sue Santiago at 412/281-4900).

*FBA - For information and reservations call Arnie Steinberg at 412/434-1190
Check this Column each month for possible revisions.

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The purpose of **Federally Speaking** *is to keep you abreast of what is happening on the Federal scene All Western Pennsylvania CLE providers who have a program or programs that relate to Federal practice are invited to advise us as early as possible, in order to include mention of them in the* **Federal CLE Corkboard™.** *Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman*

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